**MEMORANDUM OPINION**

*State of Washington v. T.M.B.*
Cause No. 04-8-00755-2
Cause No. 04-8-02369-8

The issue before the court is whether the holding in *Blakely v. Washington,* 124 S.Ct. 2531 (2004) *(Blakely)* applies to juvenile court matters. The question stated more specifically is what effect, if any, does the *Blakely* ruling have upon the court's procedure in determining whether to impose a disposition of confinement or detention greater than that prescribed in the statutory standard range.

## Statement of Facts and Statement of the Case

On July 16, 2004, the juvenile respondent in this case entered pleas of guilty in two cases. In the first case, the respondent pled guilty to assault in the fourth degree (domestic violence) and felony harassment (domestic violence)[1]; in the second case, he offered an *Alford* plea to one count of attempted robbery in the second degree.

Pursuant to plea negotiations, the respondent and the prosecuting attorney made a joint recommendation for disposition on each of these matters within the standard range.[2] The respondent's Juvenile Probation Counselor (JPC) requested that the court find that standard range dispositions in these matters were too lenient, resulting in dispositions that were manifestly unjust.[3] The JPC recommended an enhanced disposition of 52 to 65 weeks confinement at a Juvenile Rehabilitation Administration (JRA) facility.

The court heard evidence both in support of and in opposition to the imposition of a "manifest injustice" disposition outside the standard disposition range. At the conclusion of the hearing, this court ruled that the evidence proved *beyond a reasonable doubt* that disposition within the standard range would effect a manifest injustice in that it was too lenient and that respondent was in need of a longer term of confinement to provide adequate services to him and to protect society from potential re-offense by this respondent. The court imposed a term of 52 to 65 weeks confinement at JRA.

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[1] Upon the court's acceptance of respondent's plea in this matter, the state moved to dismiss one count of assault in the second degree.

[2] It should be noted that the negotiated dismissal of the assault in the second degree charge reduced the respondent's offender score such that his standard range sanctions in each case were "Local Sanctions," which could result in local detention not to exceed 30 days. A guilty finding on the assault in the second degree charge (a B+ felony), would have resulted in confinement in a Juvenile Rehabilitation Administration facility for a standard range of 52 to 65 weeks.

[3] RCW 13.40.020(17) provides: "'manifest injustice' means a disposition that either would impose an excessive penalty on the juvenile or would impose a serious, and clear danger to society . . .. "

## The Washington Sentencing Reform Act and the *Blakely* decision

The Sentencing Reform Act in Washington ("SRA") has as one of its stated purposes the imposition of structure in sentencing felony offenders. *See* WASH REV. CODE ANN. [hereinafter, "RCW"] 9.94A.010. The statute purports not to eliminate judicial discretion in sentencing. The SRA establishes a sentencing grid for various offenses cross-referencing the legislature's determination of an assigned seriousness level for each offense with the individual offender's history of criminal convictions. The SRA also provides that the court *may* impose a sentence outside the standard sentence range if the court finds that there are "substantial and compelling reasons justifying an exceptional sentence." *Id.* at 9.94A.535. The SRA enumerates a non-exclusive list of factors for the court to consider in deciding whether to impose an exceptional sentence.

In June 2004, the United States Supreme Court handed down its decision relating to exceptional (enhanced) sentencing under Washington's SRA. *See*, RCW ch. 9.94A. The *Blakely* court reaffirmed the rule expressed in *Apprendi v. New Jersey,* 530 U.S. 466 (2000) that any fact, other than the fact of a prior conviction, that the sentencing court might use to justify a sentence greater than the statutory standard range must be submitted to a jury and proved beyond a reasonable doubt. *See Blakely v. Washington,* ___ U.S. ___, 124 S.Ct. 2531, 2536 (2004).

The Supreme Court framed the issue in *Blakely* as one regarding a defendant's Sixth Amendment right to trial by jury. The context of the opinion, however, and the penumbra of the ruling are much broader than simply the jury trial question. The *Blakely* court stated expressly that it was not ruling that determinate sentencing statutes are unconstitutional; rather that determinate sentencing schemes must be applied and implemented "in a way that respects the Sixth Amendment." *Id.* at 2540.

The *Blakely* court overturned Mr. Blakely's exceptional sentence because the facts upon which his trial court relied "were neither admitted by petitioner nor found by a jury" and the sentence, therefore, violated his Sixth Amendment right to trial by jury. The Court further held that unless the defendant admits to the facts at issue, those "substantial and compelling reasons" for exceptional sentences are required to be proved beyond a reasonable doubt. The standard of proof remains an essential part of the ruling, even if the defendant were to choose to waive the right to jury fact finding and submit the issue to the judge alone.

## Washington Juvenile Justice Act

The Juvenile Court movement began in this country late in the 19th century. Illinois adopted what is believed to be the first juvenile justice statute in 1899. Washington followed the national trend to treat juvenile offenders separately and differently from adult offenders. In Washington, as in all other states, the juvenile justice system is a creature of statute.[4] Legislative history and statutory language emphasize the rehabilitative nature of

[4] The current codification of this state's juvenile offender statute is the Washington Juvenile Justice Act of 1977, at chapter 13.40, Revised Code of Washington.

the juvenile justice system and contrast it to the predominantly punitive nature of the adult criminal system.

The Juvenile Justice Act ("JJA") establishes a scheme of determinate dispositions. The bases of standard range dispositions are similar to those established in the SRA. The legislature has categorized offenses by seriousness levels and has established dispositions according to those levels and the respondents' offense histories. Juvenile court judges may grant juvenile offenders one of several alternatives to the standard range disposition, including alternatives designed to address treatment needs in the areas of mental health, chemical dependency, and sexual offenses. Eligibility for these alternatives is based, to some extent, on the length of the standard range disposition for the underlying offense.

The JJA provides that if a court concludes that a standard range disposition would effectuate a manifest injustice, the court *shall* impose a disposition outside the standard range. *See* RCW 13.40.160(2).[5] The JJA requires that a court's finding of manifest injustice be supported by clear and convincing evidence. *See id.* Evidence rules except those relating to privileges, are suspended in disposition hearings in juvenile court. *See* WASH. R. EVID. 1101(c)(3). Juvenile court judges are permitted to consider probation reports and social information without the requirement that such reports or information be formally authenticated.

**Constitutional Rights and Juvenile Offenders**

Since as early as 1967,[6] the United States Supreme Court has been analyzing the constitutionality of certain aspects and practices of the emerging juvenile justice systems around the country. *See, generally, In re Gault,* 387 U.S. 1 (1967). The Washington Supreme Court has also reviewed the requirements of the juvenile justice system in this state in a number of opinions. While these courts have acknowledged and upheld differences between juvenile offender processes and adult criminal law, they also have recognized that juveniles are nonetheless entitled to certain of the constitutional protections afforded any citizen accused of wrongdoing.

Some constitutional rights are indeed fundamental to a free society, and they are no less fundamental simply because the individual before the court is a juvenile. *See Gault,* 387 U.S. at 13-14 *(for adjudicatory phase, reconfirming applicability of Due Process Clause, requiring adequate and timely notice of proceedings, establishing right to counsel, right of confrontation, right to remain silent (and to be advised under* Miranda*)); In re Winship,* 397 U.S. 358, 368 (1970) *(establishing standard of proof beyond a reasonable doubt in adjudicatory stage of proceedings); State v. Diaz-Cardona,* ___ Wash.2d ___ , NO. 53444-1-I, slip. op. at 7 (Div. I, Sept. 27, 2004)*(Fifth Amendment privilege against self-*

[5] The maximum term of confinement for a juvenile is to age 21, or the maximum term to which an adult could be subjected for the same offense, whichever is shorter. *See* RCW 13.40.0357, "Option A"; 13.40.160 (10)
[6] Even before the juvenile justice system was wide-spread, the United States Supreme Court determined that juvenile offenders were entitled to the same due process protections as were provided to adult defendants under the Fourteenth Amendment. *See Haley v. Ohio,* 332 U.S. 596, 553 (1948).

*incrimination applies at disposition phase of juvenile case); State v. Whittington,* 27 Wash. App. 422, 428-29 (Div. I 1980) *(manifest injustice hearing is adversary, can result in imposition of higher sentence; rights of confrontation and cross-examination apply); but see State v. S.S.,* 67 Wash. App. 800, 807 (1992) *(questioning* Whittington; *ER 1101(c)(3) and RCW 13.40.150(1) do not offend confrontation clause).*

The right to a trial by jury is an important and vital right, but it is not a universal right. It is guaranteed only in cases whose historical precedents support the right. The federal constitution provides that the accused in "all criminal prosecutions" shall "enjoy the right" to trial by "an impartial jury." U.S. CONST. amend. VI. The state constitution says that the "right of trial by jury shall remain inviolate. . .." WASH. CONST. art. I, §21.

Constitutional proclamations aside, juvenile justice courts, as more recent creatures of statute, lack the historical legal context to require jury deliberation. Further, because of the social aspects of juvenile justice, juvenile offender cases do not lend themselves to jury fact-finding. *See, e.g., State v. J.H.,* 96 Wash. App. 167 (Div. I, 1999). The purposes of the Juvenile Justice Act, the differences in approach to accountability between adult and juvenile offenders, and the marked differences in the nature of the penalties imposed all weigh in favor of juvenile offender proceedings continuing to be non-jury affairs.

**Application of *Blakely* principles in juvenile court**

It is well established that there is no fundamental or substantial right to jury determination of guilt of accused juveniles. That fact alone, however, does not preclude this court heeding the rule of the *Blakely* case. Accused juveniles have and are entitled to have honored their fundamental constitutional due process rights. Affording due process rights to juveniles does not impinge upon or impair the structure and purposes of the juvenile justice system.

*Blakely* has established that, for adults, the state must prove and a jury must find, beyond a reasonable doubt, any fact asserted as support for an enhanced sentence. It is inconceivable, therefore, that the court could subject a juvenile offender to an increased disposition based on only clear and convincing evidence. This is particularly true inasmuch as the Juvenile Justice Act requires that the court *shall* impose a disposition outside the standard range upon a finding that the standard range would effectuate a manifest injustice.

The determinate disposition scheme *per se* is not unconstitutional. The ability to vary a disposition from the prescribed standard range is not unconstitutional. The JJA, to the extent it allows imposition of an enhanced disposition with respect to a juvenile offender using an evidentiary standard of clear and convincing evidence, is unconstitutional. In light of the holding and reasoning in *Blakely,* however, this court concludes that the standard of proof allowed by the statute is insufficient, making the statute unconstitutional in its application.

The State argues that the JJA statutory requirement of clear and convincing evidence is the functional equivalent of proof beyond a reasonable doubt and that the statute is, therefore, without fault. That argument is not well taken. Clear and convincing is a standard of proof that, while high, is sometimes considered necessary and sufficient in imposing civil liability. It is not sufficient to support a decision to abridge one's liberty interest, whether that individual be an adult or a juvenile.

Respondent's counsel argues that the *Blakely* decision should apply uncritically to the JJA and that this court should hold that manifest injustice dispositions are unconstitutional. Nothing in *Blakely* compels this conclusion. The respondent further argues that this court cannot impose an enhanced disposition in this case. Nothing in *Blakely* compels such restraint.

Respondent argues that the JJA, as written is unconstitutional on its face and that it must, therefore, be invalidated. To the extent the JJA and the SRA are similar in their purpose to standardize and make more predictable the consequences of breaking the law, neither statute is unconstitutional on its face. *See Blakely,* 124 S.Ct. at 2540; *State v. Harris,* ___ P.3d ___, 2004 WL 2378276 (Wash. App. Div. I, 2004), at p 3. The imposition of a determinate sanction is not inherently unconstitutional. Both the *Blakely* and *Harris* courts note that it is only the method or standard of implementation that is unconstitutional. Both the SRA and the JJA have severability provisions. Invalidity of the offending provisions does not compel invalidation of the entire statutory structure. *See Harris,* 2004 WL 2378276 at pp 4,5.

It is not a proper function of the court to legislate. Courts cannot rewrite or alter statutes. *Id.* at 6. The *Harris* court opines, however, that it is "well-settled" that courts have "inherent power to supply statutory procedures and to enforce procedural rights." *Id.* In this case, the procedural remedy to be supplied is one that comports with a juvenile's right to have any and all factors weighing on an exceptional disposition proved beyond a reasonable doubt.

In the opinion of this court, the increased standard of proof does not affect in any way the evidentiary rules or the scope of evidence the court may consider in the context of juvenile disposition hearings. All it does is require that the court use the traditional criminal law scale in weighing that evidence. In cases in which the juvenile respondent has not stipulated to admissibility of facts, other than the facts set forth in the charging documents or the fact of prior adjudication(s), the juvenile court is obliged to weigh all available evidence to determine whether the standard range disposition would effectuate a manifest injustice. If the evidence provides proof, *beyond a reasonable doubt,* that the standard range would effectuate a manifest injustice, then the court is obliged to impose a sentence outside the standard range.

**Disposition for T.M.B.**

Using the beyond-a-reasonable-doubt scale in the instant case, the court reviewed all the available evidence relating to this respondent and determined that the evidence proved

beyond a reasonable doubt that a disposition within the standard range would effectuate a manifest injustice. The statute, therefore, requires the court to impose, and this court has imposed a disposition outside the standard range as recommended by the Juvenile Probation Counselor in this matter.

T.M.B. was before this court for disposition on two cause numbers. In 04-8-02369-8, the respondent was charged with one count of assault in the second degree[7], one count of assault in the fourth degree (domestic violence), and one count of felony harassment (domestic violence). In 04-8-00755-2, the respondent was charged with attempted robbery in the second degree. The respondent's offense history includes

| Offense Date | Offense |
|---|---|
| 09/10/02 | Theft 3° |
| 12/31/02 | Theft 3° |
| 03/31/03 | Taking a Motor Vehicle without Permission |
| 10/13/03 | Attempted Theft 1° |
| 12/17/03 | Intimidating a School Official |

In May 2003, the court granted respondent a deferred disposition on the motor vehicle charge. The court revoked the deferred disposition in January 2004 because of the respondent's disregard of the conditions of his supervision and his continuing offense pattern. While the respondent was on supervision for the 2003 offenses, he committed four additional offenses, three of which are the subject for the disposition in this case.

This respondent's offense history is substantial, clear, and convincing evidence that a disposition of local sanctions the charges at issue would effectuate a manifest injustice. The community, including the respondent's own family, could not be protected adequately by a disposition of 90 days of detention to which the court would be limited.

Since he entered the juvenile justice system in May 2003, respondent has been sanctioned repeatedly for violations of the terms of his deferred disposition and for violation of conditions of probation. The other evidence available to the court in the public record supports the court's finding, beyond a reasonable doubt, that protection of the community and rehabilitation of the respondent require an enhanced term of confinement in this case.

Respondent's counsel objected to the court considering any information or evidence presented by the JPC that was gathered from in-custody interviews with the respondent without counsel present. Respondent's counsel asserted that such information was obtained in violation of the respondent's Sixth Amendment right to counsel. The court did not rule on this alleged constitutional violation, as the court did not base its decision on the social or background information from the JPC.

[7] Pursuant to plea negotiations and because of evidentiary considerations, the prosecutor moved to dismiss this count of assault in the second degree at the time of disposition. The victims of the alleged assault, the respondent's parents, were reportedly unwilling to testify against their son.

Certainly, this court's decision is supported and bolstered by the fuller range of information provided in the report of the probation counselor. This court did not have to rely on that social information, however, to reach its decision. The public record of criminal offenses and disregard of court authority were sufficient to support the court's findings in this case and the imposition of the enhanced disposition of 52 to 65 weeks of confinement in a JRA facility.

SIGNED this 9th day of November, 2004.

_____/s/_____
Suzanne M. Barnett, Judge